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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. STEVEN WARREN CARPENTER, Defendant and Appellant.	C068459 (Super. Ct. No. 09F8319)

A jury found defendant Steven Warren Carpenter guilty of two counts of failing to register as a sex offender: one based on his failure to update his registration annually under Penal Code[1] section 290.012 and the other based on his failure to report a change of address under section 290.013. Sentenced to 26 years to life in prison, defendant appeals, contending: (1) there was insufficient evidence to support his convictions; (2) section 290.013 is unconstitutional as applied to him; (3) the trial court erred in instructing the jury on both

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[1] All further section references are to the Penal Code.

counts; (4) the trial court deprived him of his right to present a defense by refusing to take judicial notice of Alaska law; and (5) the one-year consecutive term imposed for a prior prison term enhancement must be stricken because there was insufficient evidence that he was not free of prison custody for five years before his present crimes.

On review, we accept the People's concession that there was insufficient evidence to support defendant's conviction of failing to update his registration, and accordingly we will reverse defendant's conviction on that count. Otherwise, however, we reject defendant's arguments and will affirm the remainder of the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant was convicted of sex crimes requiring sex offender registration in October 1984. Defendant had most recently updated his registration in November 2007, several days before his birthday, listing as his address his mother's house in Redding.

On September 20, 2008, a detective from the Redding Police Department interviewed defendant as part of a felony investigation. Defendant confirmed he was still living at the same address. During the interview, the detective advised defendant that the case might be submitted to the prosecutor for prosecution.

On October 2, 2008, an arrest warrant was issued for defendant. The next day, the detective went to defendant's mother's house to attempt to serve the warrant, but defendant

was not there. At some point, the detective learned defendant was no longer in California.

Nearly a year later, on September 25, 2009, defendant arrived at his sister's home in Oroville. Two days later, a Butte County deputy sheriff responding to a domestic violence call encountered defendant at that location. Defendant initially gave the deputy some false names and dates of birth. Once the deputy ascertained defendant's actual identity, however, defendant admitted there was a felony warrant out for him in Shasta County. The deputy arrested him. During their encounter, defendant told the deputy that he had "recently been in the state of Alaska, and he was residing and working up there."

In a conversation recorded during a jail visit on October 1, 2009, defendant said that a year earlier he had gone "to Wasilla to see Rita," "went around there and then . . . went over to . . . Fairbanks and . . . was staying at Fairbanks for a while." He said he "just traveled around" and that he "didn't have to register in Alaska [because his] crime was before 1990." He explained he was "just gonna turn [him]self in" and he "came down just to take care of this."

Defendant was charged with one count of failing to update his registration annually under section 290.012 for failing to update his registration within five working days of his birthday in November 2008 and one count of failing to report a change of address under section 290.013 for failing to register a new address or transient location between October 2008 and September

2009. The information also alleged 18 prior convictions under the three strikes law and one prior prison term under section 667.5, subdivision (b).

The jury found defendant guilty of both counts, defendant admitted the enhancement allegations, and the trial court sentenced him to 25 years to life in prison on each count, to be served concurrently, with a one-year consecutive term for the prior prison term enhancement. Defendant timely appealed.

DISCUSSION

I

Sufficiency Of The Evidence

A

Failure To Update Registration

Defendant contends there was insufficient evidence to support his conviction for failing to update his registration in 2008 "because the prosecution failed to prove that [he] was residing in the state of California at the relevant time." The People agree.

When a violation of the registration update requirement in section 290.012 is charged, "the prosecution, not [the defendant], ha[s] the burden to prove the fact of [the defendant]'s California residency during the relevant time period beyond a reasonable doubt." (*People v. Wallace* (2009) 176 Cal.App.4th 1088, 1107 [construing former section 290, subdivision (a)(1)(D), the predecessor statute to section 290.012].) The "relevant time period" for purposes of section 290.012 is the period "within five working days of [the

registrant's] birthday," which is when the registrant must "update his or her registration" to "provide current information." (§ 290.012, subd. (a).)

Here, the People properly concede "there was no evidence as to [defendant]'s residence or even his whereabouts within five working days either before or after his birthday o[n] November 4, 2008." Absent such evidence, defendant's conviction for failing to update his registration must be reversed for insufficient evidence.[2]

B

Failure To Report Change Of Address

Subdivision (a) of section 290.13 provides that "[a]ny person who was last registered at a residence address pursuant to the Act who changes his or her residence address, whether within the jurisdiction in which he or she is currently registered or to a new jurisdiction inside or outside the state, shall, in person, within five working days of the move, inform the law enforcement agency or agencies with which he or she last registered of the move, the new address or transient location, if known, and any plans he or she has to return to California."

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[2] Because we reverse defendant's conviction on the charge of failing to update his registration for insufficient evidence, we need not address defendant's argument that the trial court erred in instructing the jury on that charge. Also, because the prison term on this charge was imposed concurrently to the term on the other charge, no remand for resentencing is necessary. All that need be done is amendment of the abstract of judgment to eliminate the conviction and sentence on count 1.

Subdivision (b) of the statute provides that "[i]f the person does not know the new residence address or location at the time of the move, the registrant shall, in person, within five working days of the move, inform the last registering agency or agencies that he or she is moving. The person shall later notify the last registering agency or agencies, in writing, sent by certified or registered mail, of the new address or location within five working days of moving into the new residence or location, whether temporary or permanent."

Defendant was convicted in count 2 of violating the requirements of section 290.013. On appeal, he contends "[t]he prosecution failed to present sufficient proof that [he] had changed his address or 'moved' so as to trigger a duty to inform law enforcement of a change of address." According to defendant, "[n]o evidence was presented to establish that [he] had moved rather than gone on vacation," and "[n]o evidence was presented to establish that [he] had a new residence address at any time between November 2008 and September 2009."

We find no merit in this argument. Essentially, section 290.13 requires a registrant who has registered at a residence address to inform law enforcement if he is permanently leaving that address. While we agree that a person who merely goes on vacation and intends to return to and continue residing at the previously registered residence address is not required by section 290.13 to notify authorities, there was more than sufficient evidence here for the jury to find that defendant was not simply "on vacation" in Alaska for a year. On the evidence,

the jury could have reasonably concluded that when defendant found out he was the subject of a felony investigation in Shasta County, he fled his mother's house in Redding where he had been registered and travelled to Alaska, where he believed he did not have to register as a sex offender. There he lived and worked, staying at Fairbanks for awhile, as well as other places. After a year, he returned to California, but instead of going to his mother's house in Redding, he went to his sister's home in Oroville, where -- when found by police -- he tried to hide his identity in a further effort to evade the warrant that had been issued for his arrest. On these facts, the jury could have reasonably found that defendant was not merely on a year-long Alaskan vacation, but rather that he had changed his residence address, which had been his mother's house in Redding, to a new address or transient location in Alaska, and that by failing to inform the authorities in California of this "move," he violated the requirements of section 290.013. Accordingly, there was sufficient evidence to support defendant's conviction of failing to report a change of address.

II

Constitutionality

Section 290.013 provides that the notice required under that statute must be given "in person."[3] Defendant contends that

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[3] There is an exception if the registrant "does not know the new residence address or location at the time of the move." (§ 290.013, subd. (b).) In such a case, notice of the new address or location, once it is determined, may be provided "in

"[a]s applied to persons such as [him] who left the state of California, th[is] requirement . . . of in person notification violates the United States Constitution by imposing an excessive burden on interstate commerce, violating [his] right to equal protection of the laws, and his right to travel." This argument is based on the premise that if a person who leaves the state without intending to change his residence (e.g., someone who "decides to travel [out of state] to visit a friend") decides, while out of state, to relocate his residence to the new state, section 290.013 requires that person to *return* to California to provide personal notice of the move. According to defendant, "[t]his amounts to a tax or burden on [defendant]'s right to move freely between the states, as well as an economic burden on the individual out of proportion to any legitimate state interest in monitoring a former resident."

We find no merit in defendant's argument because he has failed to show that he fell within the category of citizens to whom he contends section 290.013 is unconstitutional when applied.

"[W]hereas a facial [constitutional] challenge does not depend on the particular facts of an individual case [citation], an 'as applied' challenge requires the appellant to present a factual analysis of the individual case." (*Banning v. Newdow* (2004) 119 Cal.App.4th 438, 457.) The statute being challenged

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writing, sent by certified or registered mail." (*Ibid.*) Even then, however, the registrant must first provide notice in person "that he or she is moving." (*Ibid.*)

"is presumed to be constitutional and . . . must be upheld unless its unconstitutionality 'clearly, positively and unmistakably appears.'" (*Hale v. Morgan* (1978) 22 Cal.3d 388, 404.)

Defendant contends section 290.013 is unconstitutional as applied to persons who decide to relocate their residence to another state *after* they have already left California. But it was not conclusively shown in this case that defendant is such a person. Based on the evidence, the jury reasonably could have found that defendant intended to abandon his residence in California *at the time he left the state*, which was, from all appearances, shortly after he was interviewed by Redding police in connection with a possible new felony charge. If the jury found that defendant had that intent, then obviously defendant would fall outside the class of persons to whom he contends section 290.13 is unconstitutional when applied, because defendant could have provided the notice required by section 290.13 in person *before* he left the state. Accordingly, defendant's "as applied" constitutional challenge to the statute is without merit.

III

Instructional Error

Defendant contends the jury instruction on failing to register a change of address "contained an inapplicable element, omitted required elements, and improperly conflated multiple elements of two separate offenses." We disagree.

Part of defendant's challenge to the jury instruction here is based on the premise that subdivisions (a) and (b) of section 290.013 "are not alternate statements of the same offense," but instead define "two separate offenses." Based on that premise, defendant contends the instruction was erroneous because it "omitted required elements, and improperly conflated multiple elements" of the separate offenses.

These arguments are without merit because their premise is flawed. Subdivision (b) of section 290.018 makes it a felony for a "person who is required to register under the act based on a felony conviction . . . [to] willfully violate[] any requirement of the act." Here, in count 2, the "requirement of the act" defendant was charged with violating was the requirement in section 290.013 that a registrant report any change from a previously registered residence address. In this regard, subdivisions (a) and (b) of the statute do *not* set forth separate and distinct requirements, the violation of which qualify as separate and distinct offenses under section 290.018, subdivision (b). Instead, subdivision (b) of the statute simply provides that the notification requirements of section 290.013 are slightly different "[i]f the person does not know the new residence address or location at the time of the move." Whether the person knows where he will be moving at the time of the move, the basic requirement of section 290.013 is the same: the person must provide notice of the move -- i.e., that he is leaving the residence address at which he was previously registered. The small variation on the notice requirements that

exists depending on whether the person knows where he will be moving does not give rise to separate offenses. Accordingly, all of defendant's arguments based on that premise have no merit.

That leaves us with just two remaining arguments. First, defendant complains that section 290.13 "required proof that [he] was registered as a sex offender at a specific residence address," but the jury instruction required the prosecutor to prove, as an element of the crime, only that "defendant resided in Redding, California." The People do not attempt to defend this aspect of the instruction as correct, but they argue that "any error in this regard is necessarily harmless" because no reasonable jury could have found that defendant was not registered at a specific address in Redding. Defendant offers no reply to this harmless error argument.

We agree the jury instruction here should have informed the jurors that they had to find that defendant was registered at a residence address pursuant to the Sex Offender Registration Act. (See §§ 290, subd. (a), 290.013, subd. (a).) The evidence of this fact, however, was undisputed,[4] and it is clear to us beyond any reasonable doubt that the error in the jury instruction did not affect the result. (See *People v. Flood* (1998) 18 Cal.4th 470, 506-507 [instructional error removing an element from the jury's consideration "may be found harmless in circumstances

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[4] Even on appeal, defendant acknowledges that he "was registered at a residence address."

. . . in which there is no possibility that the error affected the result"].)

Second, defendant complains that "[t]he instruction given did not clearly require the jury to find beyond a reasonable doubt that [he] had 'moved' or changed his 'residence address,'" rather than simply taken "a vacation or a trip to visit friends or relatives." Not so. The instruction specifically told the jurors the People had to prove that "defendant willfully failed to inform . . . the law enforcement agency with which he last registered of *a change in his residence[] address, or transient location* . . . and any plans he has to return to California within five working days of *the move*" or that "he did willfully fail to inform . . . the agency with which he last registered within five working days that he *is moving* and to later notify that agency .. . of his *new address or transient location* within five working days of moving into the *new residence[] address or location* . . . ." (Italics added.) The italicized language clearly communicated that a move or change of residence address, and not simply a vacation or a trip, was necessary to trigger the notice requirements of section 290.013.

For the foregoing reasons, we reject defendant's contention that the trial court erred in instructing the jury on the charge of failing to register a change of address.

IV

Refusal To Take Judicial Notice

Defendant contends the trial court deprived him of his constitutional right to present a defense by "refus[ing] to

permit evidence that [he] was not required to register as a sex offender under Alaska law." We disagree.

During trial, defense counsel asked the court to take judicial notice of an Alaska case "holding . . . that there is no requirement for anyone to register as a sex offender in the state of Alaska if their conviction predates the registration requirement which I believe was in 1994." The court deferred ruling on the matter pending the prosecutor's review of the case.

In the meantime, the prosecutor offered into evidence a tape recording of a jailhouse conversation in which defendant said that "[u]p in Alaska [he] didn't have to register."

When the court and the parties later returned to defense counsel's request for judicial notice, the court questioned "the relevance of the fact that in Alaska there's no registration requirement because the [P]eople are not alleging that the defendant failed to register in another state." Defense counsel argued that "it goes to the state of mind of the defendant and the willful failure to register." Later she restated that "it goes to his mental state with respect to his -- his willingness and his attempt to comply with the law as he understood it at that time." The court observed that "we have nothing about defendant's state of mind in terms of what he knew in terms of registration requirements other than . . . that . . . the very documents the defendant initialed informed the defendant . . . that he had an obligation to notify California no matter where he went, and so the fact that he didn't have to register in

Alaska to me is not relevant . . . ." The prosecutor added that "giving [the jurors] what the law is in Alaska would only confuse them because they are going to think how am I supposed to use this law." The court agreed and ruled that "to the extent it has any limited probative value that is outweighed by the high probability that jurors could be misled or confused by it." Accordingly, the court refused to take judicial notice that defendant was not required to register as a sex offender under Alaska law.

In closing argument, the prosecutor contended defendant's belief that he did not have to register in Alaska was evidence that he did not want to register and that he therefore willfully failed to comply with his registration requirements in California. Defense counsel renewed her request for judicial notice so she could "use [the fact that there is no registration requirement in Alaska] in [her] closing argument." The court again refused, noting that "[i]t's in evidence that he believed there was no registration requirement," but "[t]he fact that it's true that he didn't have to register in Alaska is not relevant . . . and it doesn't pass [Evidence Code] section 352 muster." Thereafter, defense counsel argued, "He went to Alaska. He believed there was no reason to register in Alaska, and, in fact, there isn't."

On appeal, defendant contends he was "entitled to present defense evidence tending to show that [his] failure to give notice [of his change of residence] was not willful, and occurred without actual knowledge of a requirement to give

notice under the circumstances." He further contends "[t]he status of Alaska law was relevant to [his] state of mind regarding the wilful failure to register and his knowledge of the nature of his duty to register." We disagree. Defendant was charged with willfully failing to comply with the registration requirements of *California* law -- specifically, in count 2, with the requirement that he notify California law enforcement that he was moving from the address at which he was last registered. Whether he was required under Alaska law to register as a sex offender in Alaska was absolutely irrelevant to the matter in controversy.

Defendant contends the last advisement he received regarding California registration requirements "referred to a change in 'registered addresses,'" and since Alaska does not require registration, he could have believed that "he had no [new] registered address of which to inform the state of California." This argument is based on a misreading of the advisement on which it relies. Nowhere does that advisement refer to "registered addresses," in the plural. Rather, it simply advised defendant of the notice he was required to give to California authorities if he "change[d his] registered address to a new address" or "transient location."

Defendant contends "[e]vidence of the lack of a registration requirement in Alaska was also necessary to rebut the inference created by the prosecution that [defendant] was guilty of other uncharged bad acts under the registration statute." By this argument, defendant suggests that the

prosecution inferred defendant had a duty to register in Alaska but failed to do so. But we find no such inference in the record. It is true that the various advisement forms offered into evidence all advised defendant that if he moved out of California, he was required to register in the new state within 10 days. But defendant points to no evidence or argument by which the prosecutor implied to the jury that defendant had violated that advisement.

Under these circumstances, defendant has shown no error in the trial court's refusal to take judicial notice that he was not required to register as a sex offender in Alaska.

V

Prior Prison Term Enhancement

Defendant contends the one-year prior prison term enhancement must be stricken as an unauthorized sentence because "there was insufficient evidence to establish that [he] had . . . remained free of custody for less than five years, so as to render him ineligible for application of the five year 'wash out' provision."[5] We reject this contention.

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[5] As relevant here, subdivision (b) of section 667.5 provides for a mandatory consecutive one-year term "where the new offense is any felony for which a prison sentence . . . is imposed" and where the defendant served a "prior separate prison term," except when the prison term was "prior to a period of five years in which the defendant remained free of both the commission of an offense which results in a felony conviction, and prison custody . . . ." (§ 667.5, subd. (b).)

The information alleged that defendant was convicted of committing a lewd and lascivious act on a child under the age of 14 on or about October 26, 1984, and that he served a prison term for that offense and "did not remain free of prison custody for, and did commit an offense resulting in a felony conviction during, a period of five years subsequent to the conclusion of said term." Before the jury returned with its verdicts, defendant admitted the prior prison term allegation. Thus, the prosecution never had occasion to prove up the enhancement allegation by putting on evidence that defendant had failed to remain free of prison custody for a period of five years.

Under this circumstance, it would be improper for us to strike the enhancement based on insufficient evidence, as defendant asks us to do. To be imposed, an enhancement must be "*either* admitted by the defendant in open court *or* found to be true by the trier of fact." (§ 1170.1, subd. (e), italics added.) Had the prior prison term enhancement here been found true by the jury (or the court) based on the presentation of evidence, it would be appropriate for us to review whether that evidence was sufficient to support the finding. Defendant offers no authority, however, for the proposition that we can review an enhancement based on an admission to see if there is substantial evidence in the record to support the admission.

Defendant contends that "[a]fter admitting an enhancement allegation, a defendant may assert on appeal that his admission included a legal impossibility," but the two cases he cites in support of that contention do not help him. In *People v.*

Soriano (1992) 4 Cal.App.4th 781, the defendant pled no contest to a charge of attempting to file a forged instrument -- specifically, a death certificate -- in violation of section 115, but on appeal contended his plea was defective because a death certificate does not qualify as an "instrument" under that provision. (*Soriano*, at p. 783.) Noting that a defendant "'cannot admit the sufficiency of the evidence by pleading guilty and then question the evidence by an appeal under section 1237.5 of the Penal Code,'" the appellate court concluded that the case before it did "not present an impermissible challenge to the sufficiency of the evidence. Rather what we have here is a legal impossibility. Soriano could not have been guilty of violating Penal Code section 115 by attempting to file a forged instrument because, as a matter of law, the writing he was charged with and admitted forging, a death certificate, is not an instrument within the meaning of section 115." (*Soriano*, at p. 784.)

The case before us is distinguishable from *Soriano* because this case does not involve a legal impossibility. The legal impossibility in *Soriano* was that attempting to file a forged death certificate -- as the defendant there admitted doing -- does not violate section 115 as a matter of law because a death certificate is not an "instrument." Here, on the other hand, by admitting the prior prison term allegation, defendant was admitting that he had not remained free of prison custody for a period of five years before he committed the crimes of which he was convicted. There was no legal impossibility inherent in

that admission. Rather, on appeal defendant simply contends his admission that he had not remained free of prison custody was contrary to the evidence in the record. But, as we have noted, the prosecution never had occasion to prove up the allegation that defendant had not remained free of prison custody for at least five years because defendant *admitted* he had not. Under these circumstances, defendant's argument amounts to nothing more than an impermissible challenge to the sufficiency of the evidence.

People v. Nobleton (1995) 38 Cal.App.4th 76 is also of no assistance to defendant. There, the defendant admitted a prior prison term enhancement allegation, but on appeal contended the facts were insufficient to support the enhancement because "the five-year 'washout period' of section 667.5 commenced when he was released from prison and placed on parole," rather than when he was discharged from parole, as the People argued. (*Nobleton*, at pp. 78-79, 84.) The appellate court agreed with the defendant and struck the enhancement. (*Id.* at p. 85.)

Although the court in *Nobleton* framed the issue as whether "the facts were insufficient to support [the] enhancement" (*People v. Nobleton*, *supra*, 38 Cal.App.4th at pp. 78, 85), the issue was one of law based on undisputed facts, namely, whether the five-year free-of-prison-custody period starts when a defendant is released from prison or discharged from parole. The issue before us, however, is very different. Here, there is no dispute over the law, only a dispute as to whether, as a matter of *fact*, defendant was free of prison custody for a

period of five years before he committed the crimes of which he was convicted here. Defendant contends the evidence in the record is insufficient to support his admission that he did not remain free of prison custody for that amount of time, but there is nothing in *Nobleton* (or any other case of which we are aware) that authorizes that kind of postadmission challenge on appeal.

We close by noting that there *is* some evidence in the record that defendant did not satisfy the five-year washout period. The probation report showed he was sentenced to 38 years in prison in October 1984. There was also testimony that he first registered as a sex offender on September 3, 2003, and at that time he reported that he was released from prison on August 30, 2003. Additionally, however, the probation report shows the following under "PRIOR RECORD":

Date	Place	Offense	Disposition
2/19/2004	CDC	Parole Violation	To Finish Term

This entry tends to support the conclusion that defendant was returned to the custody of the Department of Corrections in February 2004 to serve additional prison time. Defendant argues against this interpretation of the evidence, but in the end it does not matter. The significant point is that defendant's challenge to the imposition of the prior prison term enhancement here is purely *evidentiary*. Because he admitted the enhancement allegation, however, defendant cannot properly assert on appeal that the record contains insufficient evidence to support the

enhancement. Accordingly, his challenge to the prior prison term enhancement is without merit.

DISPOSITION

Defendant's conviction for failing to update his registration annually (count 1) is reversed for lack of sufficient evidence, but the judgment is otherwise affirmed. The trial court shall prepare an amended abstract of judgment and shall forward a copy of the amended abstract to the Department of Corrections and Rehabilitation.

ROBIE, J.

We concur:

HULL, Acting P. J.

BUTZ, J.